IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 6, 2006

LADONNIS D. PETTY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-C-2074 Steve Dozier, Judge

No. M2005-01775-CCA-R3-PC - Filed September 8, 2006

The petitioner, Ladonnis D. Petty, appeals from the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that the post-conviction court erred in finding that his guilty plea was knowingly and voluntarily entered. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which DAVID H. WELLES, J., joined and GARY R. WADE, P.J., not participating.

James P. McNamara, Nashville, Tennessee, for the petitioner, Ladonnis D. Petty.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The petitioner was indicted for possession with intent to sell or deliver not less than half an ounce nor more than ten pounds of marijuana, possession with intent to sell or deliver twenty-six grams or more of cocaine, and possession of a handgun with the intent to employ the gun in the commission of or escape from a crime. The petitioner pled guilty to possession with intent to sell or deliver more than twenty-six grams of cocaine and the remaining counts were dismissed. The petitioner received an eight year sentence in the Department of Correction along with a $2,000.00 fine. The underlying facts of the case presented by the state at the guilty plea hearing were as follows:

> [O]n April 25th of 2003, Metro Vice Squad CSU Division executed a narcotic search warrant at the [petitioner's] home at 219 D. Prince Avenue here in Nashville, Davidson County. Recovered from the residence was a quantity of marijuana, a little over a quarter of a pound, and over twenty-six grams of cocaine. Also recovered was a Colt .380 pistol, a nine millimeter pistol and a .38 revolver, in addition to other paraphernalia, including marijuana roaches and baggies and things of that nature.
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> The cocaine weighed one hundred and twenty-four point four grams. The marijuana was eighty-eight point four grams.
>
> [The petitioner] said that he did sell marijuana from the residence. . . .

The petitioner filed a timely petition for post-conviction relief alleging he received the ineffective assistance of counsel. At the post-conviction hearing, however, the petitioner stated that he was not going to pursue his allegation of ineffective assistance of counsel, but pursue instead the theory that his guilty plea ran afoul of *Boykin v. Alabama*, 395 U.S. 238 (1969) and *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) *superseded on other grounds by* Tennessee Rule of Criminal Procedure 37(b) and Tennessee Rule of Appellate Procedure 3(b). The petitioner introduced no evidence at the post-conviction hearing, other than the transcript of the guilty plea hearing. The post-conviction court denied relief, stating:

> Following the hearing, the Court took the matter under advisement subject to the Court's written memorandum as to the issue of whether the guilty plea entered into by the petitioner on February 26, 2004 in this Court runs counter to the Tennessee Supreme Court's holding in *Mackey*, . . . in that the petitioner was not aware at the time of the plea that he has a constitutional right not to be compelled to incriminate himself if he so desired at trial. Based upon the proof admitted, a review of the record and a thorough consideration of the statutes and case law, the Court finds that the petitioner's insistence that the guilty plea was not entered into "voluntarily, understandingly and intelligently" in that he was not fully aware of his constitutional rights as required by *Boykin v. Alabama* and *Mackey* is not well taken and is respectfully without merit. Therefore, his petition for post-conviction relief is *denied* and the agreed-upon sentence of eight (8) years remains in effect.
>
> . . . .
>
> The petitioner relies upon the right not to be compelled to incriminate himself as the basis of his petition for post-conviction relief and claims that he was not made aware of this constitutional guarantee at the time of entering the guilty plea. However, the Court has extensively reviewed the transcript entered as an exhibit and the plea petition and finds that the petitioner's constitutional rights, namely the right not to be compelled to incriminate himself, have not been offended. The [petitioner] was asked *on the record* if he went over the plea petition with his attorney. . . . The

record reflects the petitioner answering in the affirmative. On the issue of self-incrimination, as referred to within the plea petition, Paragraph Fifteen (15) states that the petitioner has "the right to remain silent and not testify, and that (the) silence cannot be used against (the petitioner)." In addition, the transcript reflects the Court advising the petitioner "at . . . trial, the State would call witnesses. Your attorney would be able to question those witnesses for you. You also could have witnesses brought into Court to testify for you, if there were any, and you, yourself, could testify before the Jury if you chose. Do you understand those rights pertaining to a Jury trial, Mr. Petty?" The petitioner stated that he understood those particular constitutional rights. The Court is of the opinion that the language, "if you chose", [sic] naturally infers that if you did not choose to testify you would not be compelled to testify against yourself. Therefore, his right not to be compelled to incriminate himself has not been violated and his request for post-conviction relief is without merit. The Court, in addition, distinguishes the factual scenario in *Boykin*, . . . with the facts *sub judice*. In *Boykin*, . . . the facts before the nation's highest court showed that the Alabama judge who accepted the guilty plea asked *no* questions of the petitioner concerning his plea and that the petitioner did not address the court. Here, the Court asked the petitioner numerous questions as reflected on the record regarding his constitutional rights.

The Court has reviewed the record and is of the opinion that there is no constitutional requirement that would mandate this Court to allow the petitioner to withdraw his plea of guilty to the indicted charge or set aside his plea under the post-conviction relief act. So far as the record is concerned, and the plea petition supports, the petitioner entered into the plea agreement voluntarily, understandingly and intelligently. Therefore, the petitioner's petition for post-conviction relief should be respectfully *denied.*

(Internal footnotes and citations omitted).

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

ANALYSIS

On appeal, the petitioner argues that the post-conviction court erred in finding that the trial court fully admonished him of his constitutional rights, specifically of his right against compelled self-incrimination. Thus, the petitioner asserts, his plea was not voluntarily and knowingly entered. The state argues that the petitioner has waived this issue under Rule 10(b) of the Rules of the Court of Criminal Appeals for failing to cite to the appellate record in the argument section of his brief. Alternatively, the state argues that the petitioner's plea was knowingly, voluntarily and understandingly entered. While we acknowledge that the petitioner failed to reference the record in the argument section of his brief, we will nevertheless address his issue.

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, and the state standard set out in *State v. Mackey*. *See State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing by the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea; namely, that the defendant has been made aware of the significant consequences of such a plea. *Mackey*, 553 S.W.2d at 340; *see Pettus*, 986 S.W.2d at 542.

In ensuring a defendant's plea is voluntarily and knowingly given, the trial court must apprise the defendant of certain constitutional rights before accepting the plea; specifically, the right against compulsory self-incrimination, the right to confront one's accusers, and the right to trial by jury. *See Boykin*, 395 U.S. at 243; *see also Mackey*, 553 S.W.2d at 341 (outlining procedure for trial court to follow in accepting pleas of guilty which includes admonishment of right against compelled self-incrimination). If the trial court substantially complies with the advice requirement, there is no error. *Bates v. State*, 973 S.W.2d 615, 624 (Tenn. Crim. App. 1997). Substantial compliance means that "the root purpose of the prescribed litany has been served and the guilty plea passes due process scrutiny because it was made voluntarily and understandingly." *Howell v. State*, 185 S.W.3d 319, 331 (Tenn. 2006).

In the case of a patent omission from the advice litany, the error may still be harmless if the state shows the plea was nonetheless knowingly and voluntarily entered. *See State v. Newsome*, 778 S.W.2d 34, 38 (Tenn. 1989). In determining whether a plea was "voluntary" and "intelligent," the court must consider:

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citations omitted).

In our view, the record supports the conclusion that the petitioner was apprised of, and knowingly and voluntarily waived his rights guaranteed under *Boykin* and *Mackey*. A review of the plea hearing reveals the following colloquy between the petitioner and the trial court:

> The Court: [You are] charged with possession for resale of over twenty-six grams of cocaine. That charge could carry from eight to thirty years imprisonment. You're also charged with possession for resale of marijuana, which could carry from one to six years, and felony possession of a firearm, which could carry from one to six years. Do you . . . understand the charges against you?
>
> [The petitioner]: Yes, sir.
>
> The Court: Have you been able to discuss and go over those charges with [counsel]?
>
> [The petitioner]: Yes, sir.
>
> The Court: And are you satisfied with his representation?
>
> [The petitioner]: Yes, sir.
>
> The Court: All right. It's being recommended on your plea of guilty to possession for resale of over twenty-six grams of cocaine that you receive an eight year sentence to serve as a range one offender. Is that your understanding?
>
> [The petitioner]: Yes, sir.
>
> . . . .
>
> The Court: Do . . . you understand that you could have a [j]ury trial in your case and at that trial, you would be represented by your attorney. Do you understand . . . ?
>
> [The petitioner]: Yes, sir.
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> . . . .
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> The Court: At that trial, the State would call witnesses. Your attorney would be able to question those witnesses for you. You also could have witnesses brought into Court to testify for you, if there were any, and you, yourself, could testify before that [j]ury if you chose. Do you understand those rights pertaining to a [j]ury trial . . . ?
>
> [The petitioner]: Yes, sir.
>
> . . . .

The Court: If you were found guilty by that [j]ury, you would be sentenced by the Court and your attorney could appeal the conviction and the sentence to a higher Court to make sure you'd received a fair trial in this Court. Do you understand that . . . ?

[The petitioner]: Yes, sir.

. . . .

The Court: By entering your plea here today, there would not be a trial nor an appeal and this would be your last day in Court on this particular case. Do you understand that . . . ?

[The petitioner]: Yes, sir.

The Court: And is this what you choose to do?

[The petitioner]: Yes, sir.

. . . .

The Court: Do . . . you understand that this will be a felony conviction on your record that could be used against you in the future to increase the sentence in a future felony case. Do you understand that . . . ?

[The petitioner]: Yes, sir.

. . . .

The Court: All right. If you'll . . . look at this document and see if that's your signature on it? All right. . . . [I]s this your signature?

[The petitioner]: Yes, sir.

The Court: Did you go over this document with [counsel]?

[The petitioner]: Yes, sir.

The Court: Did you have any questions about it?

[The petitioner]: No, sir.

. . . .

The Court: Is there anyone forcing you in any way to enter your . . . plea . . . ?

[The petitioner]: No, sir.

. . . .

The Court: Do . . . you have any questions of the Court?

[The petitioner]: No, sir.

This colloquy "expresses the sense of the [constitutional] substance of the required advice," thereby substantially complying with the required litany. *Bates*, 973 S.W.2d at 625. "Absolute literal compliance with the advice to be given by the trial court is not required," and "[s]ubstantial compliance does not constitute error." *Howell*, 185 S.W.3d 331. Although the trial court did not use the exact words "right against compelled self-incrimination," it did state, "if you chose [to testify]." Just as the post-conviction court noted, the phrase "if you chose [to testify]" naturally indicates that one would not be compelled to testify against himself if he did not choose to do so.

Also, we note the petitioner testified at the guilty plea hearing that he reviewed the plea document with counsel. The plea document clearly states that the petitioner has "the right to remain silent and not testify, and that [his] silence cannot be used against him." The petitioner signed the plea. While a written plea will not relieve the trial court of its duty to address the accused in open court, in this case, it supports the post-conviction court's determination that the petitioner's plea was knowingly and voluntarily given. We additionally note that the petitioner did not testify at the post-conviction hearing or offer any evidence other than the guilty plea transcript to support his contention that his plea was unknowing or involuntary.

Because the transcript of the guilty plea hearing shows the trial court substantially complied in providing the mandated constitutional rights to the petitioner before accepting his plea, and because the petitioner failed to otherwise prove by clear and convincing evidence that his plea was not knowingly and voluntarily entered, we conclude the evidence does not preponderate against the post-conviction court's denial of post-conviction relief. Accordingly, the judgment of the post-conviction court is affirmed.

CONCLUSION

Upon review of the record and the parties' briefs, we affirm the post-conviction court's denial of post-conviction relief.

J.C. McLIN, JUDGE